90-1858

FILED
FEB 27 1991
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MICHAEL SWEPSTON, PAM PADLEY, BARBARA SIECK, and BENITA LEVINGSTON,

Petitioners,

vs.

CLARK DAVENPORT SNELL, SHARON RUTH SNELL, JIM R. SNELL, BETH SNELL, JASON SNELL, BRITTANY SNELL, PATRICIA JEAN TURTLE, and JESSE SANDERS,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard W. Freeman, Jr.
Assistant General Counsel
Department of Human Services
P.O. Box 53025
Oklahoma City, OK 73152-3025
(405) 521-3638

Attorney of Record for
Petitioners Michael
Swepston, Pam Padley,
Barbara Sieck, and
Benita Levingston

QUESTIONS PRESENTED FOR REVIEW

The Tenth Circuit Court of Appeals has determined that state social workers seeking a pre-petition protective custody order from a juvenile court and alleged to have assisted or acquiesced in the use of information known to be false in securing that order are not entitled to absolute immunity. The court, in addition, determined that an attorney employed by a state child protective services agency, while functioning as a prosecutor in filing an application with a juvenile court was not entitled to absolute immunity. The questions presented are:

1. Whether state social workers seeking pre-petition protective orders from a juvenile court are entitled to absolute immunity?

2. Whether an attorney employed by a state child protective services agency is

entitled to absolute immunity when filing an application with a juvenile court at the request of the juvenile court?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF AUTHORITIES.....iv

OPINIONS DELIVERED IN COURTS BELOW.....1

JURISDICTION OF THIS COURT.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....1

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....23

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES

Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987)..... 24

Coverdell v. Department of Social & Health Service, 834 F.2d 758 (9th Cir. 1987) 26

Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).....27

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L.Ed.2d 647 (1971).....29

Mitchell vs. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985).....3

Myers v. Contra Costa County Department of Social Service, 812 F.2d 1154 (9th Cir.), cert. denied, 484 U.S. 829,108 S. Ct. 98, 98 L.Ed.2d 59 (1987).....25

Snell v. Tunnell, 698 F.Supp. 1542 (W.D. Okla. 1988).....1

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990).....1, 24, 28, 29

Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L.Ed.2d 331 (1978).....27, 28

Vosburg v. Department of Social Services, 884 F.2d 133 (4th Cir. 1989).....26, 27

STATUTES

Federal

28 U.S.C. §§1131 and 1343.....3

28 U.S.C. §1254(1).....1

28 U.S.C. §1291.....3

42 U.S.C. Section 1983.....2, 4

42 U.S.C., §1985.....7

State

21 O.S. 1987 Supp. §§845, 846.....8

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion delivered in this case by the United States District Court for the Western District of Oklahoma is printed in the Appendix and is reported at 698 F.Supp. 1542. The opinion delivered by the Tenth Circuit Court of Appeals is printed in the Appendix and is reported at 920 F.2d 673.

JURISDICTION OF THIS COURT

The judgement of the Tenth Circuit Court of Appeals was entered on November 30, 1990, affirming the judgment of the United States District Court for the Western District of Oklahoma entered on November 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

21 Oklahoma Statutes, 1987 Supplement, §§845, 846 are set forth in Appendix 3.

10 Oklahoma Statutes, 1987 Supplement, §§1104.1 and 1107, are set forth in Appendix 4.

STATEMENT OF THE CASE

On September ?, 1987 Respondents commenced this civil rights action in the United States District Court for the Western District of Oklahoma to recover actual and punitive damages and to obtain injunctive relief for alleged violations of their constitutional rights arising out of child abuse and child care facility licensing investigations and related juvenile court proceedings in Oklahoma City, Oklahoma. The district court had jurisdiction pursuant to 28 U.S.C. §§1131 and 1343. Upon the subsequent appeal from the decision of the district court, the Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291; Mitchell vs. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Named as defendants in the original complaint were the Department of Human Services ("DHS") of the State of Oklahoma

and the following officials and employees of DHS: Conley Tunnell, Assistant Director, DHS, Division of Children and Youth Services ("DCYS"); Lissa Vernon, Supervisor of Child Welfare Field Services, DCYS; Mary Asbury, District Supervisor, Child Welfare Field Services, DCYS; Mike Swepston, County Supervisor, Oklahoma County Child Welfare Field Services, DCYS; Barbara Sieck, a supervisor in DHS's Oklahoma County Child Welfare Unit; Benita Levingston, a social worker in DHS's Oklahoma County Child Welfare Unit; and Pam Padley, an Assistant General Counsel in DHS's Legal Division. Also named as a defendant was the Honorable Sidney D. Brown, Presiding Juvenile Judge of the Oklahoma County District Court.

The original Complaint set out a series of alleged actions claimed to violate 42 U.S.C. §1983 (Count I), 42 U.S.C. §1985 (Count II), the Fourth, Fifth and Fourteenth

Amendments to the United States Constitution (Counts II through VII), the plaintiffs' "right to privacy in their home and the integrity of their family as protected by the United States Constitution" (Count VIII), and the Supremacy Clause (Count IX).

The plaintiffs identified in the original complaint were Clark Snell, Sharon Snell, and Jim Snell; three minor children of Clark and Sharon Snell - Beth Snell, Jason Snell, and Brittany Snell; eight children for whom Clark and Sharon Snell claimed to be legal guardians - Patricia Turtle, Melissa Hammett, Jesse Sanders, Terry Hayes, Charles Rock, Travis Rock, Charles Ford, and Barbie Ford; and seven children for whom Clark and Sharon Snell claimed to be "legal custodians" - Dominique Boone, Michael Boone, Shannon Scruggs, Arriba Jackson, Tesara Jackson, Megan Barnes, and Aqueeleh Mayberry.

On February 16, 1988 the district court appointed Ted Sherwood to serve as guardian ad litem for the fifteen children identified in the complaint as under the legal guardianship or custody of Clark and Sharon Snell. On October 13, 1988 the district court entered an order discharging Mr. Sherwood as guardian ad litem for Patricia Turtle and Jesse Sanders and allowing representation of those plaintiffs by counsel for Clark and Sharon Snell. Settlement was reached between defendants and the remaining thirteen children represented by Mr. Sherwood. As a result, the only remaining plaintiffs in the case are Clark Snell, Sharon Snell, Jim Snell, Beth Snell, Jason Snell, Brittany Snell, Patricia Turtle, and Jesse Sanders.

On October 23, 1987 a motion to dismiss was filed on behalf of DHS and its employees and a separate motion to dismiss was filed

on behalf of Judge Brown. The district court granted Judge Brown's motion and dismissed Count IX of the Complaint, but otherwise denied the motion to dismiss filed on behalf of DHS and its employees.

On February 4, 1988 plaintiffs filed an amended complaint. The only substantive amendment of the original complaint was the addition to Count VIII of an allegation of "injury to reputation". The defendants filed their Answer on February 16, 1988, asserting both absolute and qualified immunity as affirmative defenses. On September 20, 1988 Vernon was dismissed from the case by stipulation of the parties. On that date, the plaintiffs also dismissed their claims made under 42 U.S.C., §1985.

On July 6, 1988 defendants filed a Motion for Summary Judgment, asserting both absolute and qualified immunity. The district court entered an order granting

summary judgment in favor of both Tunnell and DHS. On October 28, 1988 the district court issued an order granting summary judgment in favor of Asbury, denying summary judgment to Padley, Swepston, Sieck and Levingston as to plaintiffs' Fourth Amendment claim and conspiracy claim, but otherwise granting summary judgment to defendants on plaintiffs' remaining claims. On November 2, 1988 the court issued a corrected order. The Petitioners appealed from the district court's denial of absolute and qualified immunity and the Court of Appeals entered its Order affirming the district court's decision on November 30, 1990.

The Department of Human Services is an agency of the State of Oklahoma and its statutory responsibilities include the investigation of any report of child abuse or neglect, 21 O.S. 1987 Supp. §§845, 846.

On or about August 4, 1987, Asbury received three reports relating to the Snell house. The first report alleged that from seventeen (17) to more than twenty (20) children resided at the Snell house with inadequate supervision. The second report indicated that an eleven-year-old child who had recently resided at the Snell house alleged that he had been threatened by Mr. Snell; that he had been kicked and struck by Mr. Snell; and that two children were made to sleep on the floor because they had wet their beds. The third report asserted that children at the Snell house were unsupervised and lacked adequate care.

On August 10, 1987 Asbury gave these reports to Sieck for assignment to a worker. At that time Asbury directed Sieck to delay action on the reports until she received further direction. On August 12, 1987 Asbury met with Vernon; Prins Anderson,

Programs Administrator, DHS Licensing Unit; and Padley to discuss the manner in which to proceed with the investigation of the reports in light of additional information available to DHS regarding the Snells.

In July, 1987 an allegation of neglect at the Snell house was investigated and ruled uncertain due to the Snell's refusal to provide specific information about the number and identities of children in the house. DHS had become aware that Mr. Snell had a criminal record, but that he had certified in adoptive home studies done by DHS and filed in state court that he had no criminal record. DHS had also become aware of a study of the Snell home done in February, 1987 by a private child care agency indicating that, although the Snells were not licensed as required by state law, they appeared to be operating as an emergency shelter and over a period of years

as many as one hundred (100) children had resided at the Snell house. The information in that report concerning the number of children in the Snell home and their legal status, the Snells' income, and Mr. Snell's educational background contradicted information provided by the Snells to the DHS Licensing Unit on April 1, 1987 and to other DHS officials in July, 1987. The Snells had assured DHS licensing officials that all of the children in their home were either natural or adopted children or had been placed in the home by court action.

Complaints had been received indicating that parents may have been coerced into placing their children at the Snell home. The most recent complaint of that nature had been made in the summer of 1987. The mother of one child had alleged that during the summer of 1987 she and her husband were coerced by staff at a local shelter into

signing a document granting temporary custody of her child to the Snells with the threat that if they failed to sign they would lose their child because "welfare" would be called.

At the meeting on August 12, 1987 these matters were discussed by Asbury, Anderson, Vernon and Padley. It was decided at that time that Child Protective Services would seek police assistance in conducting the investigation and that Padley would attempt to contact the district attorney's office.

On or about August 12, 1987 Asbury directed Levingston, the worker to whom the current referrals had been assigned by Sieck, to determine which police department had jurisdiction and to contact the appropriate police department for assistance in conducting the investigation. On or about August 14, 1987, Detective Jay Einhorn of the Oklahoma City Police Department

(OCPD) went to the DHS building at the request of Levingston. Levingston was not present during the discussion that followed. Swepston and Asbury related to Einhorn that they felt there was something possibly going on at the Snells' that would involve the police department because of the large number of children involved, the Snells' refusal to provide a worker with information about the children and the fact that Mr. Snell had filled out documents for DHS stating he had no criminal record. Einhorn had already found Mr. Snell's criminal record.

According to Einhorn, the possibility of child prostitution or child trafficking was discussed between himself, Asbury and Swepston and Einhorn might have been the person who brought up the question. The speculation on child prostitution, child trafficking, or similar offenses took on a

greater meaning for Einhorn and became a serious question in his mind only after his latter contacts with the F.B.I. Einhorn told Swepston and Asbury that a police investigation was warranted and told them not to do anything until they heard further from him.

On or about August 12th, 1987, Asbury discovered that a state statute provided that it is a misdemeanor to have guardianship of more than five (5) unrelated persons. This statute made it clear that previous statements by Mr. Snell regarding legal guardianship could not be true if there were indeed fifteen (15) to twenty (20) children in the house. Levingston, Sieck, and another DHS employee, at the direction of Asbury, contacted the police and Judge Brown concerning the application of this statute to the Snell situation. Padley was ultimately contacted for an

interpretation of the statute and indicated that she did not understand the statute to authorize removal of children.

On August 24, 1987, Asbury met with Levingston. Asbury told Levingston that she was concerned that the police did not appear to be doing anything. On, or just prior to, August 24, 1987, Asbury gave Levingston a licensing statute which contained the language "upon conviction" and told Levingston it was relevant to the Snell case. Levingston asked for and received permission from Swepston and Sieck to talk to Judge Brown and ask him for an interpretation of this statute. Levingston went to Judge Brown's office and asked him for an interpretation of the statute. Judge Brown's interpretation was that the "upon conviction" language did mean that violation of the statute was a misdemeanor and that the parents could be arrested.

Three contacts with the district attorney's office were attempted while the investigation was pending. On or about August 24, 1987 Levingston attempted to consult with Assistant District Attorney Mary (Mimi) Smith for the purpose of interpreting the licensing statute given to Levingston by Asbury; however, no discussion relating in any manner to the Snells ever occurred between Levingston and Smith. Approximately one week prior to August 26, 1987 Padley attempted to discuss the Snell situation with Rebecca McNeese, Assistant District Attorney in charge of juvenile matters. McNeese abruptly ended the conversation, apparently because she was angry about another case that had arisen in child welfare, and permitted no opportunity for a discussion of the Snell situation. McNeese testified that she was told by one of her assistants, Steve Sullins, that he

had been approached by Sieck about picking up 19 or 20 children in a home and had been given a copy of a guardianship statute and a written statement by a woman who had had a child at the Snell. There is no affidavit or deposition testimony from Sullins in the record. Sieck testified that on August 20th she took the guardianship statute to the district attorney's office and explained the problems occurring in trying to investigate the Snell situation and that she was never told by the district attorney's office that the statute could not be a basis for intervention.

On August 26, 1987 between 8:00 and 8:30 a.m. Levingston called Einhorn and told him the interpretation Judge Brown had given the statute. Levingston suggested to Einhorn that he call Judge Brown to make sure Einhorn understood the same thing that Levingston had understood. That morning

Judge Brown received a message from Einhorn requesting the Judge to call and stating "Important, please call back as soon as possible." Upon returning the call Einhorn advised the Judge that the FBI was investigating the Snells because an associate of theirs was involved in interstate pornography and prostitution and that they were concerned about the children's welfare. It was Judge Brown's understanding from Einhorn's representations that the OCPD and the FBI were investigating the Snells along with DHS.

Einhorn asked the court for a pickup order and was to obtain it approximately one hour later. Because of a hearing, however, the Judge did not have the order prepared when Einhorn arrived. The judge therefore directed his bailiff to call Padley and tell her what information Einhorn had given him, and to further instruct Padley to call

Einhorn and "get this information coordinated". Judge Brown would have issued the order based on the oral representations made to him by Einhorn; however, because the Judge was so rushed he wanted it in writing. Indeed, had the Judge been pressed by Einhorn he would have given Einhorn the order. After Einhorn had left Judge Brown's office, Judge Brown called Padley and asked her if she could present an application to the Court.

On August 26, 1987 Einhorn contacted Padley and informed her that he had contacted Judge Brown earlier that morning regarding the Snells and that Judge Brown was going to issue an order to the police; however, when Einhorn had gone to Judge Brown's office, the Judge had indicated he wanted an application from DHS. Einhorn indicated to Padley that he was aware of a police investigation of the Snells regarding

child prostitution and pornography. Relying on the statements of Einhorn, the request by the court, and her previous knowledge of DHS abuse/neglect investigations regarding the Snells as well as the licensing issues involved, Padley prepared and filed the application.

The application recited that DHS had received allegations of neglect, lack of supervision and child pornography in the Snell's home; that DHS had received information that the Snells were operating an unlicensed emergency shelter; that DHS had been unable to complete its investigation due to lack of cooperation by the Snells; and that DHS was concerned regarding the welfare of children residing there. The application requested the court to provide whatever assistance it deemed appropriate.

Prior to filing the application, Padley attempted to contact Asbury, Tunnell and Vernon, but was unsuccessful. Padley testified that the assertion DHS had received allegations of child prostitution and child pornography was based upon the second of two conversations she had with Detective Einhorn on the morning of August 26, 1987. Padley further testified that subsequent to her first conversation with Einhorn she had telephoned some "child welfare people", including Swepston, Levingston, and perhaps Sieck, and discussed the current status of the case and the investigation. There is no evidence that Padley discussed the information she received from Einhorn with Levingston, Sieck or Swepston. No one either encouraged or discouraged her from filing the application or reviewed the application after Padley prepared it for submission to Judge Brown.

Upon presentation of the application, Judge Brown dictated an order to the Oklahoma City Police Department directing that Clark and Sharon Snell cooperate with DHS in investigations regarding child abuse and licensing. The order further provided that access be provided to children living at the Snell house. The order further required that "any police officer or law enforcement agency is hereby directed to execute this Order," and take into custody any child for whom "Clark and Sharon Snell and/or their agents are unable to produce valid Court Orders signed by a Judge" pertaining to the child.

At approximately 3:50 P.M on August 26, 1987, Padley delivered the order to the office area of Levingston whereupon it was reviewed by Levingston, Sieck, Swepston and Padley. Between 5:30 and 6:00 P.M. on August 26th, Sgt. George Johnson of the OCPD, as

well as officers Picchione and Hill, were accompanied by Levingston and Sieck to the Snell home. Upon arriving at the home, Sgt. Johnson examined documents relating to children residing there and with the assistance of the other officers and DHS employees, he was able to identify seven children for whom no court document was produced. Sgt. Johnson determined that, in accordance with the court's order, the seven children for whom no valid court order had been produced would be placed in his custody and removed from the house. The seven children were placed in patrol cars and transported to the Oklahoma County Juvenile Shelter and admitted by the officers to the shelter.

REASONS FOR GRANTING THE WRIT

The Court of Appeals determined that Petitioners are not entitled to absolute immunity in seeking a pre-petition order

from the juvenile court. Petitioners respectfully assert that this decision is in conflict with decisions of other U.S. Courts of Appeal on the same matter and decide a federal question in a way that conflicts with applicable decisions of this Court.

The Tenth Circuit Court of Appeals concluded that Swepston, Sieck and Levingston were not entitled to absolute prosecutorial immunity because "[A] social worker seeking a pre-petition order for protective custody functions like a police officer seeking an arrest warrant; a functional approach to immunity requires that those performing like functions receive like immunity." Snell, 920 F.2d at 690, citing Austin v. Borel, 830 F.2d 1356, 1362 (5th Cir. 1987). In addition, the Court of Appeals found absolute immunity for these Petitioners inappropriate since, viewed in the light most favorable to the plaintiffs,

"the summary judgment evidence indicates that these defendants assisted or acquiesced in the use of information known to be false concerning the Snells ... ". Id. at 691-92. The Court denied absolute immunity to Padley on the ground that although Padley "was functioning as a prosecutor, she did so without color of authority in these circumstances ... ". Id. at 696.

The Ninth Circuit has adopted a rule of absolute immunity for child dependency proceedings from origination until conclusion. In Myers v. Contra Costa County Dep't of Social Serv., 812 F.2d 1154, 1157 (9th Cir.), cert. denied, 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987), the court held that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child and dependency proceedings." Relying upon

Myers, the Ninth Circuit has held that a social worker seeking a court order for immediate apprehension of a newborn from her natural mother is entitled to absolute immunity for such quasi-prosecutorial conduct. Coverdell v. Department of Social & Health Serv., 834 F.2d 758, 764 (9th Cir. 1987). In Coverdell, the social worker completed an affidavit used by the prosecutor in obtaining a court order for custody of the child. Id. at 760. Under a theory of quasi-judicial immunity, the court determined that the social worker was entitled to absolute immunity for seeking and obtaining the order. Id. at 764-65.

In Vosburg v. Department of Social Services, 884 F.2d 133 (4th Cir. 1989), the court determined that social workers filing pleadings for temporary custody in advance of a formal petition are entitled to absolute immunity. The court based that

determination in part on the conclusion that "[U]nder Virginia law, the filing of a removal petition, in essence, is the start of judicial proceedings against the parent or guardian of the minor child, and the duties of the social worker at that point are those of an advocate in that process." Id. at 137.

The decisions of this Court concerning absolute immunity establish two points relevant to the instant case. First, absolute immunity of public officials cannot be defeated on the grounds that the officials' conduct was malicious or dishonest. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 993, 47 L.Ed.2d 128 (1976); Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 1104-05, 55 L.Ed.2d 331 (1978). Second, when the jurisdiction or authority of an officer to act is at issue, absolute immunity is inappropriate only when there is

a complete and clear absence of all jurisdiction. Stump, 435 U.S. at 356-57, 98 S.Ct. at 1104-05.

In the instant case, pre-adjudicatory custody orders issued by the juvenile court are likewise, in essence, the start of a judicial process against the parent or guardian of a minor child. In practice, orders for protective custody frequently precede petitions. Snell, 920 F.2d at 690. The Court of Appeals acknowledged that applicable Oklahoma Statutes did not prescribe any procedure for seeking or securing pre-adjudicatory orders from the juvenile court and that the policies and procedures regarding such orders were established by the presiding judge of the juvenile division of the district court. Snell, 920 F.2d at 695. The Court of Appeals also acknowledged that the presiding judge of the juvenile court requested the

application from DHS and told Padley to prepare the application. Snell, 920 F.2d at 693. Under these circumstances, Padley clearly possessed at least colorable or arguable authority to act.

The Tenth Circuit's treatment of social workers involved in seeking pre-petition orders from the juvenile court conflicts with the Ninth Circuit's and Fourth Circuit's treatment of workers similarly situated. The juvenile court system is quite distinct from the criminal justice system, see McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 1989, 29 L.Ed.2d 647, (1971), and child protective services workers charged with application of intentionally broad statutory language for the protection of children should be distinguished from police officers and afforded the immunity extended in these circumstances by the decisions of the Ninth

and Fourth Circuit Courts of Appeal. Further, the Tenth Circuit's reliance on allegations of fraud in denying absolute immunity conflicts with decisions of this Court. Petitioners respectfully assert that these conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

Richard W. Freeman, Jr.
Assistant General Counsel
Department of Human Services
P.O. Box 53025
Oklahoma City, OK 73152-3025
(405) 521-3638

Counsel for Petitioners